



REPUBLIC OF KENYA



**One Upperhill Towers Limited v Credit Bank Limited & 2 others (Civil Appeal (Application) E132 of 2025) [2025] KECA 1960 (KLR) (21 November 2025) (Ruling)**

Neutral citation: [2025] KECA 1960 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E132 OF 2025  
W KARANJA, M NGUGI & AO MUCHELULE, JJA  
NOVEMBER 21, 2025**

**BETWEEN**

**ONE UPPERHILL TOWERS LIMITED ..... APPLICANT**

**AND**

**CREDIT BANK LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**GARAM INVESTMENTS AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**PURPLE ROYAL AUCTIONEERS ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for an order of stay of proceedings and an injunction against the ruling and order of the High Court at Nairobi (P. Mulwa, J.) dated 24th February 2025 in HCCCOMM No. E053 of 2025)*

**RULING**

1. The background of the dispute between the parties herein is that, vide a charge dated 15<sup>th</sup> September 2020 the applicant, One Upperhill Towers Limited, secured all that property known as Nairobi/Block 31/219 (the suit property) in favour of Credit Bank Limited, the 1<sup>st</sup> respondent, for the provision of financial facilities amounting to Kshs.1,200,000,000 to Jabavu Village Limited and Hasson Pharmaceuticals Limited (the 1<sup>st</sup> and 2<sup>nd</sup> borrowers). The facilities were granted. By plaint dated 30<sup>th</sup> January 2025, the applicant approached the High Court at Nairobi in HCCCOM. No. E053 of 2025 complaining that, although the loan was being regularly serviced, the 1<sup>st</sup> respondent had instructed the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, Purple Royal Auctioneers and Garam Investments Auctioneers, to sell the suit property to recover the outstanding amounts. What was being demanded was USD 9,250,996.91. It was contended that the intended sale was malicious, unprocedural and unlawful as the mandatory provisions of sections 89, 90 and 96 of the Land Act had not been followed, and the applicant's right to redeem the property was being compromised. With the suit was a notice of motion seeking a temporary injunction to stop the sale of the suit property.



2. The 1<sup>st</sup> respondent filed a response to state that there was default in the repayment of the loan which had led to the letter dated 6<sup>th</sup> September 2022 seeking the settlement of the outstanding arrears and the regularization of the current account. When nothing was done to pay the arrears to regularize the current account, the statutory 90 days' notice was issued. This was followed by the 40 days' notice under section 96(2) of the Land Act with regard to the property. The property was valued and the notification of sale went out.
3. The applicant's quest for a temporary injunction was premised on the claim that the statutory notices were defective and not served, and that the suit property had been undervalued.
4. According to the 1<sup>st</sup> respondent, the amounts due under the loan were USD9,611,501.89 and USD 6,162,440.67.
5. The High Court heard the notice of motion and declined to grant the temporary injunction. On prima facie basis, it was found that there was default of obligations under the charge; there was notice to the applicant to rectify the default; there was no rectification; there was statutory notice to sell; the redemption notice was issued; and the property had been valued as was required by section 97(2) of the Land Act.
6. The applicant was aggrieved by the refusal to grant it a temporary injunction and filed a notice of appeal. With it was filed the present notice of motion under Rule 5(2)(b) of the Court of Appeal Rules, 2022 seeking an injunction to restrain the respondents from entering, selling by public auction, taking over, advertising for sale or in any other way whatsoever, interfering with the suit property. From the grounds, supporting affidavit and the draft memorandum of appeal, the applicant's case is that the High Court erred in its findings in regard to the statutory notice, right to redemption and the valuation, and that these will be the basis of the intended appeal. The applicant states that it has an arguable appeal, and that if injunction is not granted, the suit property will be illegally sold and that the intended appeal will be rendered nugatory. The notice of motion also sought the stay of proceedings in the High Court.
7. The 1<sup>st</sup> respondent opposed the motion and in its replying affidavit, repeated what it had told the superior court:- that the loan was extended; there was failure to service it; the entire outstanding facility became immediately due and payable as had been agreed; there was letter of default; statutory notices were issued; opportunity to redeem was given; and the suit property was put up for public auction, following valuation. According to the 1<sup>st</sup> respondent, the intended appeal was not arguable and it will not be rendered nugatory if an injunction is not granted.
8. We were addressed by learned counsel, Mr. Morton Mutunga for the applicant and learned counsel, Mr. Gakunga for the respondents. Each had filed written submissions which they highlighted.
9. In his submissions, learned counsel Mr. Mutunga, while making reference to the decisions in David Moton Silverstein -vs- Atsango Chesoni [2002] eKLR and Nairobi City Council -vs- Tom Ojienda & Associates, Civil Appeal (Application) No. E080 of 2022, argued that the intended appeal had arguable grounds. Regarding the limb on whether the intended appeal will be rendered nugatory, it was argued that the applicant was in possession of the suit property; and that its sale would irreparably injure it. It was further argued that the applicant was willing and able to comply if the intended appeal were to be lost. We were referred to the decision in Mwadzaya Wachanda Clan Welfare Registered Trustees & 58 Others -vs- Petro Oil Kenya Ltd & 6 Others [2022]eKLR.
10. According to learned counsel Mr. Gakunga, the applicant does not have an arguable appeal, given the material that was placed before the High Court and this Court. It was submitted that, while charging



the suit property, the applicant was aware that a default in servicing of the facility would give rise to the exercise by the 1<sup>st</sup> respondent of its statutory power of sale; that the charged property was a commodity for sale; that the exercise of the statutory power of sale cannot cause any risk to the applicant; instead, the injunction and stay of proceedings would cause great prejudice to the 1<sup>st</sup> respondent. It was, lastly, submitted that the loaned sums were huge and their non-payment would affect the 1<sup>st</sup> respondent's liquidity standing and expose it to regulatory and non-compliance complications.

11. We have considered the application, the rival affidavits and the submissions by learned counsel. We have to determine whether the applicant is deserving of the prayers in the application. In doing this, we bear in mind that our jurisdiction under Rule 5(2)(b) is original and discretionary. The applicant has to demonstrate that the intended appeal has at least one arguable ground, and that, unless the Court grants the injunction, its intended appeal, if successful, will be rendered nugatory (see *David Morton Silverstein -vs- Atsango Chesoni* (supra)). It is also clear to us that the applicant need not show at this stage that the grounds on which the intended appeal will be based will likely succeed. All that is required to be demonstrated is that the grounds raise serious questions of law that will be worthy of consideration by the Court that will ultimately deal with the appeal.
12. Given this low threshold, we have no hesitation in finding that the draft memorandum of appeal raises arguable issues.
13. But that is not enough. The appellant has to show, at the same time that the not granting the injunction will render the intended appeal, if successful, nugatory (see *Chris Munga N. Bichange -vs- Richard Nyagaka Tongi & 2 Others* [2013] eKLR). Factors which can render an appeal or intended appeal nugatory are to be considered within the circumstances of each particular case. The Court has to consider the conflicting claims of the applicant and the respondent to determine the question (see *Luka & 3 Others -vs- Chairman Land Adjudication Committee, Leshuta Adjudication Section & 6 Others*, Civil Appeal (Application) No. E005 of 2022 [2023] KECA 1232 (KLR)).
14. From the material before us, the loan facilities had accumulated to USD 9,611,501.89 and USD 6,162,440.67 at the time the parties were before the superior court. They certainly continue to grow. The fact that the applicant was heavily indebted to the 1<sup>st</sup> respondent is not in question. During the hearing of the application, we asked the applicant's counsel to show that, even as its client litigated, the loan was being serviced. There was no categorical response. An injunction is an equitable remedy that a court can grant when it believes it is fair and appropriate. Secondly, where there is clear evidence that the applicant is in default, and the suit property herein was charged to secure the loan, the property becomes a commodity for sale upon the default. The right of the 1<sup>st</sup> respondent to realise the security becomes established upon the default. The 1<sup>st</sup> respondent is a bank, and if it turns out that the notices were not procedurally issued, the ascertained value of the suit property, if it is ultimately sold, can be paid. In *Mrao Limited -vs- First American Bank of Kenya Limited* [2003]eKLR, it was observed that an applicant in similar circumstances like the present one would not be deserving of an injunction.
15. In conclusion, we find that the application is not merited. The same is dismissed with costs to the respondents.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF NOVEMBER 2025.**

**W. KARANJA**

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**JUDGE OF APPEAL MUMBI NGUGI**

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**JUDGE OF APPEAL**

**A. O. MUCHELULE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

